STATE OF MICHIGAN

COURT OF APPEALS

LISA BERRY,

Plaintiff-Appellant,

V

BARTON-MALOW CO. and BARTON-MALOW ENTERPRISES, INC.,

Defendants-Appellees,

and

TROY SCHOOL DISTRICT,

Defendant-Not Participating.

UNPUBLISHED
July 22, 2003

No. 235475
Oakland Circuit Court
LC No. 00-020107-NO

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition to defendants Barton-Malow Company and Barton-Malow Enterprises, Inc., based on MCR 2.116(C)(10). We affirm in part and reverse in part.

I. Facts and Proceedings

In February 1997, the Troy School District entered into a contract with defendant Barton-Malow Company (Troy/Barton-Malow contract). The contract provided that defendant[1] would serve as the construction manager for a 1997 bond issue program related to installing technology systems in several of its public schools. The Troy/Barton-Malow contract provided that as construction manager, defendant agreed to, among other things, administer the construction contracts, coordinate construction on the project, obtain satisfactory work from the contractors,

[1] Defendant Barton-Malow Enterprises, Inc., is the parent company of Barton-Malow Company. Defendant Barton-Malow Enterprises, Inc., was not directly involved in the construction project at issue. Accordingly, for ease of reference, the term "defendant" refers to Barton-Malow Company.

monitor construction costs, conduct meetings, and maintain accounting records. Additionally, defendant agreed to review the contractors' safety plans. However, this responsibility did not "extend to direct control over or charge of the acts or omissions of the Contractors, Subcontractors, agents or employees of the Contractors or Subcontractors, or any other persons performing portions of the Work and not directly employed by the Construction manager."

In January 1998, defendant produced a Project Manual that described the bidding requirements and contract provisions for contractors interested in bidding on the Troy School District technology project. Plaintiff's employer, Air and Water Systems, Inc., contracted with the Troy School District in April 1998 to perform electrical work related to this project (Troy/Air and Water Systems contract). The Troy/Air and Water Systems contract stated that plaintiff's employer, as the contractor, was responsible for "initiating, maintaining and supervising all safety precautions and programs in connection with the work." Additionally, plaintiff's employer was required to "take all reasonable precautions for the safety of . . . all employees on the Work and all other persons who may be affected thereby" and maintain all safeguards for safety. Moreover, "[e]ach Contractor [was] solely responsible for all safety precautions necessary in performing the work."

Plaintiff's employer did not contract directly with defendant.

Plaintiff is a skilled journeyman union electrician with over twenty years of experience. She began working on the Troy schools project in mid-May 1998 at Boland Middle School. On July 2, 1998, at approximately 12:30 p.m., plaintiff returned to work after lunch and one of defendant's employees instructed plaintiff to "go give a hand" at "pulling cable" in the school's "switch gear room," also referred to as the boiler room. Plaintiff entered the small switch gear room and noticed that a metal ladder labeled "Barton-Malow" was leaning against the power panel (or "buss") on the wall, approximately 8 feet above the ground. To complete her assigned task, plaintiff needed to climb the ladder to access the buss and then tie a rope to the metal eye on the end of a fiberglass tape known as "fish tape" that is threaded through conduit leading to the buss. After the rope is tied on, the person at the other end pulls the fish tape back through the conduit and ties a cable to the end of the rope. Then, plaintiff would pull the cable through the conduit and make the appropriate connections at her end of the conduit. Plaintiff testified that she had completed this task safely on numerous prior occasions. Generally, if the electricity is flowing through the buss when the task is being performed, the panel is shielded with cardboard to prevent the metal eye from contacting the buss.

In this instance, the person "pushing" the fish tape through the conduit was in an adjacent room, and plaintiff was not provided with any communication devices. When plaintiff began climbing the ladder to reach the buss, she heard the buss humming, so she knew it was live, but there was no cardboard present shielding the panel. She then saw that the fish tape had already been threaded through the conduit and that the metal eye was directed into the live buss. At this point, plaintiff knew something "real bad" was going to happen. She began to descend the ladder, but before she reached the ground, an electrical explosion occurred, sending 480 volts of electricity through her body, resulting in burns on plaintiff's face, hands, and arms for which plaintiff received treatment at a hospital.

Plaintiff collected workers compensation benefits as a result of this incident and filed this action against defendants. In her complaint, plaintiff alleged that defendant Troy School District

had failed to carefully select a general contractor, did not delegate supervision of safety assurance, retained control over the contractor's methods, and was vicariously liable for the negligence of its general contractor. Plaintiff's suit against Troy School District was dismissed on the basis of governmental immunity on June 7, 2001. The trial court found that because the school was not open to the public at the time of the incident, the requirements of the public building exception to governmental immunity were not met. Plaintiff has not appealed the trial court's dismissal of the school district.

Plaintiff also alleged in her complaint that defendant was a general contractor that retained control of the project on which plaintiff was working, and that as the general contractor defendant was liable because the incident occurred in a common work area. Finally, she alleged that the work she was performing was inherently dangerous such that defendant, as the general contractor, was liable.

In January 2001, the Barton-Malow defendants moved for summary disposition pursuant to MCR 2.116(C)(10), contending that there was no genuine issue of material fact that defendants did not retain control of the work area, that plaintiff's injuries did not occur within a common work area, and that the work plaintiff was performing was not inherently dangerous. At the hearing on the summary disposition motion, defendants conceded for purposes of the motion that they were the general contractor on the project. Defendants contended that, nevertheless, they were entitled to summary disposition because only one contractor was working in plaintiff's work area, because they were not aware of the danger confronted by plaintiff, and because plaintiff had failed to show that the danger she faced created a high degree of risk to a significant number of workers.

The trial court granted defendants' motion, and this appeal ensued.

II. Standard of Review

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Terrien v Zwit*, 467 Mich 56, 61; 648 NW2d 602 (2002). Summary disposition pursuant to MCR 2.116(C)(10) is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). The moving party must first identify the issues concerning which no genuine issue of material fact exists, and in order to defeat the motion, the nonmoving party must offer evidence demonstrating a genuine issue of material fact. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). The court can consider only substantively admissible evidence in making its decision, MCR 2.116(G)(6), and the nonmoving party may not rest on mere denials or allegations. *Id.* The reviewing court must consider all of the offered evidence in a light most favorable to the nonmoving party. *Id.* at 164.

III. Analysis

In *Ormsby v Capital Welding, Inc*, 255 Mich App 165; 660 NW2d 730 (2003), another panel of this Court thoroughly discussed the body of law that directs our analysis of the issues in this case. In general, "the employer of an independent contractor is not liable for harm caused to another by the subcontractor or its servants." *Id.* at 173, citing *Groncki v Detroit Edison Co*, 453 Mich 644, 662; 557 NW2d 289 (1996); *Hughes v PMG Building, Inc*, 227 Mich App 1, 5; 574

NW2d 691 (1997); *Signs v Detroit Edison Co*, 93 Mich App 626, 632; 287 NW2d 292 (1979); 2 Restatement Torts 2d, § 409, p 370. As the Court in *Ormsby* recognized, however, there are exceptions to this rule, *Ormsby, supra* at 173, three of which are particularly relevant here.

> The three exceptions implicated in this appeal are: (1) when the general contractor retains control over the work, *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994); (2) where there are readily observable and avoidable dangers in common work areas that create a high degree of risk to a significant number of workers, *Funk v General Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on other grounds *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982); and (3) where the work is inherently dangerous, *Phillips, supra* at 406. [*Ormsby, supra* at 173.]

A. Retained Control

In order for liability to exist under the retained control exception,[2] the general contractor's or owner's retention of control must have had, at a minimum "'some *actual effect* on the manner or environment in which the work was performed.'" *Ormsby, supra* at 183, quoting *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 76; 600 NW2d 348 (1999). The level of control must not consist merely of "'supervisory and coordinating authority over the job site,'" *Ormsby, supra* at 184, quoting *Groncki, supra* at 662, but must be a "'high degree of actual control.'" *Ormsby, supra* at 185, quoting *Phillips, supra* at 408. In other words, the owner/general contractor must not only possess control over the work site, it must exercise it, thereby affecting "the manner or environment in which the work is performed." *Ormsby, supra* at 184. The existence of retained control is generally a question of fact for the jury. *Ormsby, supra* at 185 n 5, citing *Phillips, supra* at 408.

We first address defendants' argument that the retained control theory applies only to owners. Because defendants raise this argument for the first time on appeal, they have failed to properly preserve it. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Nevertheless, because the issue is a question of law, we will briefly address it. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Simply stated, defendants' first argument lacks merit because the retained control exception applies to general contractors as well as owners. *Ormsby, supra* at 185 ("A general contractor must exercise a 'high degree of actual control' to be liable under this theory . . . ."); *Plummer v Bechtel Construction*, 440 Mich 646, 661-662; 489 NW2d 66 (1992) (Levin, J.) (stating that the Restatement distinguishes between instances when

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[2] As the Court in *Ormsby* made clear, the retained control exception is distinct from the common work area exception to non-liability. *Ormsby, supra* at 176-185. We reiterate this point because the parties in this case seem to confuse the issues somewhat, failing in their arguments to adequately distinguish between the "active" control required to meet the requirements of the retained control exception, *Ormsby, supra* at 184, and the "passive" control that suffices under the first prong of the common work area exception. *Id.*

an "owner/general contractor" gives a subcontractor suggestions she "'need not'" follow and those she is not "'entirely free'" to disregard); *Johnson v Turner Construction Co*, 198 Mich App 478, 480; 499 NW2d 27 (1993) ("[A] general contractor may be held liable when it retains control of the work.").

Defendants argued below, and the trial court agreed, that even if the retained control exception applies to general contractors, it does not apply to defendants because their authority under the terms of the Troy/Barton Malow contract was limited to coordination of the project. We disagree. "[W]hile a contractual obligation to control a work site is relevant in determining whether a general contractor retained control, . . . the contractual obligation alone is not sufficient . . . . [If the contractor] 'retain[s] at least partial control and direction of *actual* construction work[,]'" this is sufficient to impose liability upon the general contractor. *Id.*, quoting *Samodai v Chrysler Corp*, 178 Mich App 252, 256; 443 NW2d 391 (1989).

As we noted earlier, the Troy/Barton-Malow contract provides that defendant, while not a general contractor, nevertheless would administer the construction contracts, coordinate construction on the project, obtain satisfactory work from the contractors, monitor construction costs, conduct meetings, maintain accounting records, and review the contractors' safety plans. In addition, plaintiff testified that a Barton-Malow employee directed her work on the day in question and instructed her to "give a hand" at pulling cable in the switch gear room, which she did. Plaintiff also testified that her employer, Air and Water Systems, Inc., did not have a foreperson on site, but "had Barton-Malow out on the job." Viewing this evidence in a light most favorable to plaintiff, we conclude that plaintiff's testimony creates a genuine issue of material fact regarding whether defendant retained at least partial control and direction of work on the site, thus being subject to liability under the retained control exception. Accordingly, we reverse the trial court's grant of summary disposition in favor of defendants concerning the retained control exception.

B. Common Work Area

Imposition of liability under the common work area exception requires proof that (1) the owner/general contractor has at least supervisory and coordinating authority, (2) the danger is readily observable and avoidable, (3) the location of the danger is a common work area, and (4) the danger creates a high risk to a significant number of workers. *Ormsby, supra* at 180, citing *Phillips, supra* at 407; see also *Hughes, supra* at 8. Whether an injury occurred in a common work area is generally a question of fact for the jury. *Ormsby, supra,* at 187 n 7, citing *Groncki, supra* at 663.

Plaintiff is unable to establish liability under the common work area exception because the evidence is insufficient to create a genuine issue of material fact regarding all the required elements. Because of the location of plaintiff's injury, the evidence fails to show either that the danger was readily observable by defendants, or that other workers could have been subjected to the same hazard that ultimately resulted in plaintiff's injury. See *Hughes, supra* at 7. In addition, plaintiff presented no evidence concerning the number of workers potentially subjected to this danger. In *Hughes*, the Court found that where only four workers were exposed to the same danger as the plaintiff, as a matter of law this was not a "significant" number. *Hughes, supra* at 7-8. Because a common work area cannot exist where the danger fails to present a high degree of risk to a significant number of workers, *Funk, supra* at 104, plaintiff has not

demonstrated a genuine issue of material fact on her claim that the common work area exception applies. Accordingly, we affirm the trial court's ruling concerning the common work area exception.

C. Inherently Dangerous Activity

The final exception to non-liability is the inherently dangerous activity exception. This exception applies "where the independent contractor is hired to do work that either necessarily involves danger to others unless great care is used or poses a peculiar risk of harm to others." *Phillips, supra* at 406. "The special risk of danger must be recognizable in advance, at the time the work is contracted, in order to invoke the doctrine." *Id.* Whether a job is inherently dangerous is a question of fact for the jury. *Id.* "However, the mere fact that the job site is hazardous or involves risk of serious injury does not necessarily create a question of fact regarding liability for breach of a nondelegable duty to guard against injury from an inherently dangerous activity." *Ormsby, supra* at 190.

Defendants argue that they cannot be liable under the inherently dangerous activity exception because they did not employ plaintiff. Again, defendants did not raise this argument below, so it has not been properly preserved. *Fast Air, Inc, supra* at 549. Defendants also claim, however, that ordinary safety measures such as covering the buss with cardboard would have protected plaintiff from the injuries she suffered. Plaintiff, on the other hand, argues that working with 480 volts of electricity is inherently dangerous, as is evident from the numerous safety precautions required by rules promulgated under the Occupational Health and Safety Act.

We find that although high voltage electricity itself may be inherently dangerous, the activity plaintiff was performing, "pulling cable," is not inherently dangerous. The fact that electricity was flowing through the buss at the time of plaintiff's injury does not change our analysis. When an activity is "inherently" dangerous, it is dangerous at all times, which is why special precautions are needed to avoid injury. *Dowell v General Telephone Co of Michigan*, 85 Mich App 84, 91; 270 NW2d 711 (1978), citing 65 CJS, Negligence, § 66, p 944, n 32.25. Here, the testimony showed that pulling cable can be accomplished safely when the power is turned off and even when the electricity is flowing, as long as a piece of cardboard is used to shield the buss. The evidence also showed that by contract, plaintiff's employer could have requested that the power be turned off prior to engaging in this activity, as long as forty-eight hours advance notice was given, but that no such request was made. Therefore, we find no error in the trial court's conclusion that there was no genuine issue of material fact as to whether "pulling cable" is inherently dangerous.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood